Supreme Court, U.S.
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No. 08-220

IN THE
Supreme Court of the United States

DANA GRESBACH,

Petitioner,

v.

MICHAEL C., CHERITA C., KIMBERLY W., ALEXIS C, and IAN W.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATED COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a social worker conducting a child abuse investigation based on information twelve days old was correctly denied qualified immunity when she required an eight year old boy and his nine year old step-sister at a private school to remove items of clothing in order to allow her to examine their bodies for marks, based solely on permission to "interview" the children?

2. Whether government social workers conducting child abuse investigations, which routinely involve a dual purpose implicating both civil and criminal law, should be excepted from traditional Fourth Amendment standards, where such investigations regularly include physical examinations infringing fundamental rights of bodily privacy and of familial integrity?

3. Whether Gresbach waived her argument that the special needs exception should apply to social workers when she failed to raise it in the trial court?

4. Whether a social worker was properly denied qualified immunity when she acted contrary to both recent binding Seventh Circuit precedent and this Court's previous pronouncement in *Florida v. Jimeno*, 500 U.S. 251 (1991), by performing warrantless physical examinations on minor children without consent, probable cause, or exigent circumstances?

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STATEMENT OF THE CASE

A. Summary

Petitioner asserts that there is a "nationwide epidemic" of child abuse and neglect necessitating this Court's attention to the application of Fourth Amendment constitutional protections to social workers. Pet. for Cert. at 2 (hereafter "Pet. __"). This assertion is at best questionable. While it is certainly true that *reports* of child abuse or neglect abound, resulting in myriad investigations, it is by no means clear that actual abuse or neglect has occurred in the majority of cases. Moreover, the statistics in this field are notoriously unreliable. *See, e.g.*, Jim Hopper, Ph.D., CHILD ABUSE: Statistics, Research, and Resources, *www.jimhopper.com* (Sept. 2008) ("All statistics on the incidence and prevalence of child abuse and neglect are disputed by some experts.").

The truth is that Child Protective Services ("CPS") frequently does more harm than good in its Rambo-style *modus operandi*, treating law-abiding parents wrongly charged with abuse or neglect as criminals.[1] Child abuse investigations routinely "undermine the fundamental values of privacy, dignity, personal security, and mobility

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[1] Gresbach was "trained to try to meet with the child before contacting the parents because it minimizes the opportunity for the parents to coach the child to keep quiet, or to alter the child's version of what transpired." Pet. 5 (citing R-35-2 at 10). The irrebuttable presumption is that parents cannot be trusted to cooperate and can only taint the investigation. Further, it is "policy" that when one child is alleged to have been abused, the social worker will interview (and often perform physical examinations on) *all* the children, regardless of the lack of specific allegations of harm to them. *Id.*

that are protected by the Fourth Amendment." Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 Wm. & Mary L. Rev. 413, 418 (Nov. 2005) (observing that in over seventy percent of child abuse investigations nationwide the government is unable to demonstrate abuse, and arguing that "in the name of saving children from the harm that their parents and guardians are thought to pose, states ultimately cause more harm to many more children than they ever help"). Requiring confused and frightened children to remove all or part of their clothing is particularly invasive. *See* Scott A. Gartner, Note, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 S. Cal. L. Rev. 921, 930-31 (1997) (describing emotional impact of strip searches).[2]

Additionally, the vast majority of social workers interview children at *public* schools, not *private* schools. R.35-9 at 2 (estimating that the Bureau performs as many as 50 times the interviews at public schools that it does at private schools). Any perceived epidemic is therefore not precipitated by difficulties applying Fourth Amendment standards in *private* schools, where only a small fraction of the Bureau's cases arise anyway.

In short, as Professor Coleman argues, "[i]t is . . . wrong to abandon all respect for the values ensconced in the Fourth Amendment" simply in order to accommodate our burgeoning welfare system. The petition for certiorari should be denied.

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[2] While Gresbach argues that she does not personally force children to remove all of their clothes, the authority she claims would equally allow her to require the children to strip naked. Her position is thus a distinction without a difference in the law of the matter.

B. Statement of Facts

1. First allegation

On January 16, 2004, the Bureau of Milwaukee Child Welfare ("the Bureau") received a report from the Milwaukee Police Department alleging physical abuse by Michael C. upon Ian W. R. 35-6 at 2. The reporter was Yvette Harris, Ian's aunt and sister of his biological father, Ismaa'eel Abdur-Rahim. *Id.* According to Harris, Abdur-Rahim had told Cherita, Ian's mother, "that the step father [Michael C.] is not to touch Ian." *Id.* Ms. Harris would pick Ian up from Cherita C.'s home and bring him to his every-other-weekend visit with his father "so the parents do not get into confrontations." *Id.* The police also spoke with Michael C., who cooperated fully. R. 35-7 at 2.

The police found "no neglect or maltreatment of children." *Id.* Dana Gresbach failed to note on her report form the date of the incident giving rise to the referral (R. 35-3 at 7), although she admitted this was an important fact. R. 35-7 at 3. That the police had actually been to the home and spoken with both the step-father and the child did not "make a hill of beans of difference" to Gresbach. R.35-5 at 4.

2. Second allegation

On January 30, 2004, the next time Abdur-Rahim had visitation with Ian, Ms. Harris made another referral, claiming this time that Ian told her that Michael C. had hit him two days earlier, on January 28, 2004. R. 35-7 at 2. But Ms. Harris did not report the alleged abuse *until five (5) days later*, on February 4, 2004. *Id.* On the afternoon of February 9, 2004, *twelve (12) days after the alleged incident*, Gresbach finally went to see the

child, making an unannounced visit to the school. R. 35-3 at 11. Gresbach failed in her written reports even to mention Cheryl Reetz, the principal, but Gresbach testified at length about an alleged conversation she had with Reetz at the school. R. 35-3 at 11-12.

According to Gresbach's recollection at her deposition, Reetz told her she had never been involved in anything like this before, did not know where they ought to report something if they encountered evidence of abuse, and did not even know what a mandated reporter was. R. 35-3 at 12. Gresbach said she gave Reetz some basic information as to how the system worked, and gave her a phone number for further information. *Id.* Gresbach could not believe that a school with so many "inner city children" would not be more experienced in child abuse investigations. R.35-3 at 13.

Gresbach never informed Reetz of her right to refuse permission for the interviews or her right to contact the parents. *Id.* When Reetz asked if she could call the parents, Gresbach told her "no." *Id.* The reason Reetz wanted to call the parents was to ask their permission for Gresbach's interviewing the children. R. 35-1 at 13. When Reetz asked if she could sit in on the interviews, Gresbach again told her "she didn't need to." R. 35-1 at 6. It made Reetz "nervous that somebody else would see the children without the parents' consent." *Id.* Allowing a stranger to talk to the children was "just something we generally don't do without parents knowing." R 35-1 at 7. Reetz would not have allowed anyone other than a government representative she thought had authority to interview children at the school. R. 35-1 at 13.[3]

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[3] It is Gresbach's practice to allow no one else into the room with her when she interviews children. R.35-2 at 9. Neither does she videotape or record her interviews. *Id.*

Nonetheless, based on Gresbach's responses, Reetz believed she was legally obligated to comply with her demands and that she was legally prohibited from contacting or discussing the incident with the children's parents. R 35-1 at 14. In fact, Gresbach also believed at the time that she did not need permission, because under Wis. Stat. §48.981, she "had the legal right to interview children at any location without the parents' permission except in the home." R 35-4 at 13.[4] Therefore, it was Gresbach's practice not to ask permission for interviews at a school, even a private school. R. 35-3 at 14. It was also her practice not to allow anyone else into the room when she conducted her interviews, and the Bureau had "absolutely no standard" with respect to such matters. R. 35-2 at 9.

Gresbach was accustomed to performing physical examinations on many of the children she interviewed, and consequently did not discuss with her supervisor her intention to require the children to disrobe. R. 35-4 at 7. She estimated that she performed physical examinations in perhaps fifty percent (50%) of the cases she handled. R. 35-2 at 9. After all, it was her responsibility, she believed, that whenever there was an allegation of physical abuse on any part of a child's body "to make sure this child isn't being abused," which routinely meant examining the rest of his body, too. R. 35-4 at 6.

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[4] The statute provides in pertinent part: "The agency may contact, observe or interview the child at any location without permission from the child's parent, guardian or legal custodian if necessary to determine if the child is in need of protection or services..." Wis. Stat. § 48.981(3)(c)1. *Doe v. Heck*, 327 F.3d 492, 528 (7th Cir. 2003), found this statute "clearly unconstitutional as applied" to authorize "government officials to interview children suspected of being abused on private property without a warrant, probable cause, consent, or exigent circumstances." *Id.*

3. The Interviews with the Children

When Gresbach interviewed Ian, she looked at his wrist, where the alleged welt was said to have been, and saw nothing. R. 35-6 at 2. Undaunted, however, she then required Ian to lift his shirt and, apparently, to pull down his pants, as she stated that she observed his legs. *Id.* ("Ian was checked for suspicious injuries on his arms, back, chest and legs and no marks or scars were observed.").[5]

Gresbach then proceeded to interview Ian's step-sister, Alexis. R. 35-4 at 8. Alexis denied *ever* having received marks from a spanking (or "whooping"). *Id.* (Q: "So because her brother said he had a mark on his wrist and his forehead, you check Alexis who denies ever receiving a mark and ask her to disrobe?" A: "That's correct."). Gresbach nevertheless required her to pull down her tights in order that Gresbach could physically examine her. *Id.*[6]

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[5] Gresbach implies that Ian told her he currently had other marks. Pet. 8 ("Ms. Gresbach asked if he had other marks. Ian said yes, ..."). In fact, in response to Gresbach's question whether he had *ever* had any marks, Ian responded that he had once had a bruise on his forehead. R35-4 at 5. He never said he had any marks still visible.

[6] Gresbach repeatedly refers to this invasive and embarrassing exercise of forcing a child to partially strip down to her underclothes while a complete stranger stares at her body as a mere "visual examination of non private areas," as if it were an everyday occurrence of no legal consequence. In fact, it is an invasion of basic human dignity of constitutional magnitude, as both lower courts correctly held. *See, e.g.*, App. 18a ("conducting a search of a child's body under his clothes, on private property, without consent or the presence of any other exception to the warrant requirement of the Fourth Amendment, is in direct violation of the child's constitutional

(Cont'd)

The Bureau recognizes that the search of a child's body is much more intrusive than simply asking questions, and that there is a difference in the type of consent required for the two actions. R. 58-2 at 18-19. But the Bureau has not defined "consent," R. 58-2 at 17, and has no procedures or guidelines in place concerning physical examinations and the need to obtain consent to perform them. R.35-4 at 6-7.

The file was eventually closed as "unsubstantiated."

REASONS FOR DENYING THE PETITION

I. THERE IS NO SPLIT IN THE CIRCUITS BECAUSE THE "SPECIAL NEEDS" EXCEPTION APPLIES TO ABUSE INVESTIGATIONS IN *PUBLIC* SCHOOLS, NOT *PRIVATE* SCHOOLS.

Gresbach urges this Court to adopt a general "reasonableness standard" applicable to child abuse and neglect investigations on private school property "rather than the requirements of probable cause and a warrant." Pet. 15. She argues that the "special needs-general reasonableness" analysis applicable to searches in public schools should be applied to private schools as well.[7]

(Cont'd)

right to be free from unreasonable searches"); *see also Good v. Dauphin County Social Services for Children and Youth*, 891 F.2d 1087, 1092-93 (3d Cir. 1989) ("It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that, it is a violation of any known principle of human dignity.").

[7] She states that the "distinction between public and private schools is irrelevant to the question of whether probable cause or a reasonableness standard should be applicable to Fourth Amendment searches in the context of child abuse

(Cont'd)

As discussed below, "reasonableness" is not a generally applicable "facts and circumstances" test. Rather, this Court has determined that the "special needs" of *public* schools to conduct searches and maintain order entitle them to an exception to the Fourth Amendment's probable cause-warrant requirement, and "reasonableness" is simply the standard used in assessing the legality of a search only after the court makes the threshold determination that the "special needs" exception applies.

Additionally, this Court and the lower courts uniformly apply the "special needs-reasonableness" analysis to *public* schools only. While there may well be some divergence among the circuits applying that standard in public school contexts, there is no authority whatsoever for applying it to *private* schools, and Gresbach cites none.

A. "Consent" and "Exigent Circumstances" are the Traditional Exceptions to the Fourth Amendment's Probable Cause-Warrant Requirement.

Obviously, the "ultimate measure" of constitutionality under the Fourth Amendment is "reasonableness." *Vernonia School District 47J v. Acton*, 515 U.S. 646, 652 (1995). And "reasonableness" is determined by "balancing [the] intrusion on the individual's Fourth Amendment interests against [the] promotion of legitimate governmental interests." *Id.* at 652-53 (citations omitted).

(Cont'd)
investigations," Pet. 15, that children's "expectation of privacy" in both "the public or private school setting . . . must be tempered by the realities of the school environment," Pet. 19, and that "there is no logical reason for distinguishing searches at private schools from those at public schools where the worker is properly on the premises." Pet. 21.

Contrary to Gresbach's assertion, however, "balancing interests" is not some amorphous, all-purpose, facts-and-circumstances rationale for whatever a social worker thinks she has good reason to do. Rather, this Court has established "carefully defined classes of cases" and the specific "standard[s] of reasonableness" that the "balance of interests" requires in each class. *O'Connor v. Ortega*, 480 U.S. 709, 719 (1987).

For many years, "one governing principle, justified by history and by current experience, has consistently been followed: *except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant.*" *Camara v. Municipal Court*, 387 U.S. 523, 5288-29 (1967) (emphasis added, citations omitted.)

In most cases, therefore, the balance of interests requires the "usual warrant or probable-cause requirements." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). This Court has noted "time and again" that "searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few *specifically established and well delineated exceptions.*" *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993) (emphasis added, citations and internal quotations omitted).Among those few "specifically established and well delineated exceptions" are consent, *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973), and exigent circumstances. *United States v. Karo*, 468 U.S. 705, 718 (1984). Exceptions are grudgingly granted because "the privacy interests protected by the Fourth Amendment are to be jealously guarded." *Wilson v. Health and Hosp. Corp. of Marion County*, 620 F.2d 1201, 1209 (7th Cir. 1980) (citations omitted).

Those rules apply on private school property the same as any other private property. A corporation has reasonable privacy expectations no less than a homeowner. *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977); *Camara*, 387 U.S. at 523. Churches and private schools in particular have privacy expectations in their premises. *Curtis v. Thompson*, 840 F.2d 1291, 1300 (7th Cir. 1988) (citations omitted); *Simpson v. Saroff*, 741 F.Supp.1073, 1078-79 (S.D.N.Y. 1990). A private school's expectations of privacy are especially acute because private education is an exercise of fundamental familial liberties. *See generally*, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923).

B. The Reasonableness Standard is not Applicable Outside the Narrow Class of Cases Qualifying for the "Special Needs" Exception.

Occasionally, government may have "special needs, beyond the normal need for law enforcement, [which] make the warrant and probable cause requirement impracticable." *Vernonia*, 515 U.S. at 654 (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (internal quotation marks omitted). In such cases, a lower standard may be appropriate "depend[ing] in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara*, 387 U.S. at 533 (citations omitted).

In *New Jersey v. T.L.O.* 469 U.S. 325 (1985), this Court addressed "the questions of the proper standard for assessing the legality of searches conducted by public school officials and the application of that standard to the facts of this case." *Id.* at 329. The Court first determined that a public school official was entitled to

the special needs exception in searching a student's purse for contraband. *Id.* at 340 ("The warrant requirement, in particular, is unsuited to the school environment . . . . [W]e hold today that school officials need not obtain a warrant before searching a student who is under their authority."). The Court then determined that a general "reasonableness" standard was appropriate in determining the legality of the search. *Id.* ("[T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.").

Contrary to Gresbach's urging, then, the *T.L.O.* Court did not create some all-purpose, peripatetic standard to be applied wholesale to any kind of official investigation. Rather, it directed that the "reasonableness" standard should be applied *only* after determining that the special needs exception applied to the public school official's search. *Id.* at 351 ("Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.").

Also contrary to Gresbach's claim, the special needs-reasonableness analysis does not apply to searches on *private* school premises. Its use is explicitly limited to assessing "the legality of searches conducted by *public* school officials . . . ." *Id.* at 329 (emphasis added). It is also inapplicable to searches conducted in cooperation with law enforcement. *Id.* at 342 n.7 ("We here consider only searches carried out by school authorities acting alone and on their own authority. This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law

enforcement agencies, and we express no opinion on that question."); *see also Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001) (government can justify warrantless searches under "special needs" exception only when "divorced from the State's general interest in law enforcement").[8]

II. THE CIRCUITS UNIFORMLY LIMIT THE SPECIAL NEEDS-REASONABLENESS ANALYSIS TO PUBLIC SCHOOL SEARCHES AND APPLY BASIC WARRANT EXCEPTIONS TO PRIVATE SCHOOL SEARCHES.

Gresbach asserts that the circuit courts are "inconsistent" and that the "lower courts are split" between applying the reasonableness standard and basic warrant exceptions. Pet. 11, 15. She cites only two cases for the "split," *Wojcik v. Town of N. Smithfield*, 76 F.3d 1 (1st Cir. 1996), and *Wildauer v. Frederick County*, 993 F.2d 369 (4th Cir. 1993). Pet. 18. She paints those cases with the broadest of brushes, without factual recitation or analysis. But as discussed below, *Wojcik* is a garden variety public school special needs decision following *T.L.O.* and *Vernonia*. *Wildauer* is a garden variety consent case, applying the basic Fourth Amendment principles and warrant requirement exceptions. There is no split in the circuits.

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[8] In Wisconsin, a charge of physical abuse implicates possible criminal penalties. *See* Wis. Stats. Ann. §§ 48.02, 48.981(3)(b)3 and (3)(c)5m, and 939.22. The government's interests here, then, are not divorced from its general interest in law enforcement.

A. The Circuits Uniformly Apply the Warrant Requirement and Permitted Exceptions.

Gresbach claims that the circuits have "collapsed" the "reasonableness" test into four exceptions – warrant, probable cause, exigent circumstances, and special needs. Pet. 18. But the circuits aren't "collapsing" anything. Rather, as the following summary illustrates, they are uniformly applying this Court's basic Fourth Amendment principles in the context of child abuse investigations on private property.

Second Circuit: "[A]s discussed in connection with the Fourth Amendment implications of Sarah's removal from school, we find that the Fourth Amendment's reasonable or probable cause and exigent circumstances doctrines apply to searches and seizures made in the course of child abuse investigations." *Tenenbaum v. Williams*, 193 F.3d 581, 606 (2d Cir. 1999), *cert. denied*, 529 U.S. 1098 (2000).

Third Circuit: "It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions . . . ." *Good v. Dauphin County Social Services for Children and Youth*, 891 F.2d 1087, 1092-1093 (3d Cir. 1989) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1970)).

Fifth Circuit: "[A] social worker must demonstrate probable cause and obtain a court order, obtain parental consent, or act under exigent circumstances to justify the visual body cavity search of a juvenile." *Roe v. Texas Dept. of Protective and Regulatory Services*, 299 F.3d 395, 407-408 (5th Cir. 2002).

Seventh Circuit: "Because we conclude that [a private school and student] had a reasonable expectation of privacy in and within the school's premises, the defendants' warrantless search of the school and seizure of the child are presumptively unreasonable, . . . and can only be upheld if either falls within one of the 'few specifically established and well delineated exceptions' to the Fourth Amendment's warrant and probable cause requirements . . . ." *Doe v. Heck*, 327 F.3d at 513 (citations omitted).

Ninth Circuit: "[I]t was settled constitutional law that, absent exigent circumstances, police could not enter a dwelling without a warrant even under statutory authority where probable cause existed." *Calabretta v. Floyd*, 189 F.3d 808, 813 (9th Cir. 1999) (internal citations omitted).

Tenth Circuit: "The general rule is that a warrantless search conducted without consent is 'presumptively' unconstitutional unless it fits within certain narrow exceptions to the general rule." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1212 (10th Cir. 2003) (internal citations omitted).

B. The Circuits Uniformly Follow this Court's Limitation of the Special Needs-Reasonableness Analysis to Public School Searches.

Gresbach relies heavily on *T.L.O.*, but as already stated, the special needs-reasonableness analysis in *T.L.O.* is strictly limited to "the legality of searches conducted by *public* school officials . . . ." 469 U.S. at 329 (emphasis added). She also cites *Vernonia* for the proposition that there is no distinction between "the public or private school setting . . ." Pet. 19. But *Vernonia's* limitation of the special needs-reasonableness analysis to public schools could not

be more explicit: "In *T.L.O.* we rejected the notion that public schools, like private schools, exercise only parental power over their students, which of course is not subject to constitutional constraints." *Vernonia*, 515 U.S. at 655.

Gresbach also cites *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986), for the proposition that "probable cause and the warrant requirement did not apply in the context of a visual inspection of areas of a child's body as part of a child abuse investigation at a public school." Pet. 13. But *Darryl H.* has no application in a *private* school context because it explicitly follows *T.L.O. Darryl H.*, 801 F.2d at 900. The Seventh Circuit noted the obvious distinction in *Doe v. Heck*, 327 F.3d 492, 514 (7th Cir. 2003) ("The key difference between the searches at issue in *Darryl H.* and *Landstrom*, and the search and seizure in this case, is that the searches in *Darryl H.* and *Landstrom* took place on public school grounds with the consent of public school officials.")[9]

C. Gresbach Mischaracterizes *Wojcik* and *Wildauer*.

Gresbach claims that *Wojcik* and *Wildauer* apply a "general reasonableness" test. Pet. 18, 21-22. However, she provides no analysis, and completely mischaracterizes those authorities. *Wojcik* was a public school case, and the only

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[9] Gresbach attempts to distinguish *Heck* and *Darryl H.* by suggesting that there were free exercise issues in those cases but not here. Gresbach is mistaken. Both *Heck* and *Darryl H* were pure Fourth Amendment cases. *Darryl H.* was also a public school case, and while *Heck* refers to free exercise interests, the court analyzed only Fourth Amendment claims, 327 F.3d at 509, familial relations (substantive due process) claims, *id.* at 517, and procedural due process claims, *id.* at 526. Neither case analyzed or decided a free exercise claim.

"novel element" was that school officials transported a child from one school to another in furtherance of their investigation. *Wojcik*, 76 F.3d at 3. *Wojcik* follows *T.L.O.* and *Vernonia*, and explicitly limits its analysis to public schools.

> The Fourth Amendment has been applied to public schools officials, primarily in the investigation of student misconduct or crime. *E.g.*, *Vernonia School District v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). The Fourth Amendment, however, protects against unreasonable seizures. Nothing in the present facts made it unreasonable for the school, acting in loco parentis, to move one of the children from one school to another school in the vicinity, so that both children could be questioned together by a state official following upon a possible abuse report made by one of the teachers.

Wojcik, 76 F.3d at 3.

Gresbach's citation of *Wildauer* is even more misleading, because *Wildauer* is a garden variety "consent" case. Wildauer was a foster mother who challenged entry by a social worker and nurses into her unsanitary home to examine the foster children's health. The Fourth Circuit easily disposed of her claim based on consent: "Wildauer's consent to Cruger's entry is uncontested." *Wildauer*, 993 F.2d at 372. The court held: "Having consented to Cruger's entry, Wildauer could not deny access to the other members of the party." *Id.*

Moreover, the only claims analyzed by the court were Wildauer's claims that the entry and inspection of the

children violated *her* Fourth Amendment rights. The children were *foster* children *already* in state custody — the authority of the state to examine them was not at issue. The court simply noted that Wildauer's "attenuated" privacy interests were outweighed because she did not have legal custody, officials already had the right to physically examine the foster children, and the natural parents also had the right to enter Wildauer's house to retrieve their own children. *Id.* at 372–373.

Finally, Gresbach cites *Roe v. Texas Dept. of Protective and Regulatory Services*, 299 F.3d 395, 399 (5th Cir. 2002), for the proposition that there is a spectrum of applicable approaches. Pet. 22. Once again, however, *Roe* is a "consent" case that had nothing to do with a search on private school premises. *Roe* presented two questions, the initial entry into Mrs. Roe's home, and the physical examination of her daughter for sexual abuse. The district court found an issue of fact regarding entry into the home, but the Fifth Circuit held on appeal: "We avoid the first question by holding that Mrs. Roe consented to an investigative home visit." *Id.* at 400-401. The court found that she had consented to her daughters' physical examination as well. *Id.* at 399.

By contrast, neither the parents nor Principal Reetz had any opportunity to object to Gresbach's physical examinations of the children here, because Gresbach had forbidden Reetz from being present during the examinations, and had also forbidden Reetz from notifying the parents that Gresbach was seeing the children. Indeed, Reetz had no way of knowing Gresbach intended to require the children to disrobe, as Gresbach had not said anything about her intentions. *See* App. 6a, 14a, 35a. This case is a far cry from the circumstances in *Roe*.

D. The Circuits Uniformly Follow Black Letter Warrant Exceptions in Analyzing Searches on Private School Premises.

Lower court decisions applying the warrant requirement and exceptions to private school searches are limited but uniform.

In *Simpson v. Saroff*, *supra*, a private school principal alleged that she was arrested for refusing to allow police to enter the school building to question students who had fled there after reportedly committing a robbery and assault of other students just minutes before. *Id.* at 1075-76. Even in that extreme situation, the court denied a summary judgment motion by the police, who argued there was no violation of the principal's Fourth Amendment rights. *Id.* at 1073.

As discussed above, the Seventh Circuit applied black letter warrant-probable cause exceptions in *Doe v. Heck*, concluding that the social workers' "warrantless search of the school and seizure of the child are presumptively unreasonable, . . . and can only be upheld if either falls within one of the 'few specifically established and well delineated exceptions' to the Fourth Amendment's warrant and probable cause requirements . . . ." 327 F.3d at 513 (citations omitted).

The Eighth Circuit has likewise applied the traditional analysis to Fourth Amendment claims on private property. In *Heartland Academy Community Church v. Waddle*, the district court held: "In the context of removing a child from his home and family, a seizure is reasonable if it is pursuant to a court order, if it is supported by probable cause, or if it is justified by exigent circumstances, meaning that state officers 'have reason to believe that life or limb is in immediate

jeopardy.'" 317 F.Supp.2d 984, 1091 (E.D. Mo. 2004) (citations omitted). The court continued, "[t]he same standard for reasonableness applies when a child is seized from a private school where she has been placed by her parents." *Id.* (citing *Doe v. Heck*, 327 F.3d at 512) ("In our view, there is no basis for concluding that when a minor child is entrusted to the care of a private school *in loco parentis* his reasonable expectation of privacy, vis-a-vis government officials, differs in any material respect from that which he would otherwise expect to receive at home."). On appeal, the Eighth Circuit summarily affirmed: "Upon review of the record in this case, we conclude that the court's factual findings regarding the process employed by Waddle in obtaining the ex parte orders are not clearly erroneous. Likewise, upon de novo review, we see no error in the legal conclusions on the reasonableness of the seizures and the Fourth Amendment violation." *Heartland Academy Community Church v. Waddle*, 427 F.3d 525, 533 (8th Cir. 2005).

In this case, the Seventh Circuit analyzed Gresbach's consent defense under the same well-established rubric. Gresbach argued that her search was "objectively reasonable" because she had "general consent." App. 13a. The court noted that while a "search conducted pursuant to consent" is an "established exception to the warrant requirement," the search is reasonable only "as long as it remains within the scope of the consent." *Id.* at 13a-14a (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) and *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)). But the consent exception is "grudgingly granted because `the privacy interests protected by the Fourth Amendment are to be jealously guarded.'" *Id.* at 13a (quoting *Heck*)

(additional citations omitted). The court then determined that Reetz's consent for Gresbach to interview the children did not include consent to inspect their bodies as well. *Id.* at 14a. The court concluded with the unremarkable proposition that social workers must be subject to "basic Fourth Amendment principles under non-exigent circumstances." *Id.* at 15a-16a.

III. THIS COURT HAS STRICTLY LIMITED THE *T.L.O.* "SPECIAL NEEDS" EXCEPTION TO SEARCHES ON PUBLIC SCHOOL PROPERTY, AND THERE IS NO NEED TO EXTEND IT TO PRIVATE SCHOOL PROPERTY.

A. There Is No Split Among the Circuits Applying the Special Needs Exception to Child Welfare Investigations.

Gresbach requests this Court to issue a writ to "settle the conflict in the lower courts as to whether the special needs doctrine applies [to] investigations of child abuse" by extending the special needs exception to all child welfare investigations on private school property. Pet. 16.

Gresbach assumes without discussion that there is, in fact, a split among the circuits on this point. But as discussed above, "reasonableness" and "special needs" are not separate and distinct analyses. Rather, "reasonableness" is simply the standard to be applied in special needs cases. This Court and the lower courts have appropriately limited the "special needs" exception to public schools, and Gresbach presents no authority for striking that limitation and creating virtually unlimited authority for social workers to seize and search children whenever and wherever they deem appropriate.

Gresbach cites *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 829-830 (2002), but *Earls* was a drug investigation case that affirms this Court's long line of cases limiting special needs-reasonableness analysis to searches in *public* schools.

> Significantly, this Court has previously held that "special needs" inhere in the public school context. . . . . While schoolchildren do not shed their constitutional rights when they enter the schoolhouse, . . . "Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."

Id. at 829-830 (citing *Vernonia*, 515 U.S. 653, *T.L.O.*, 469 U.S. at 339-340, and *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506).

Gresbach also cites *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006), and *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999). *Brigham City* involved an officer entering a home without a warrant after observing a fight inside, and *Wyoming* involved a warrantless search of a driver's purse for contraband during a traffic stop. Neither addresses child welfare investigations, much less searches on private school property.

Finally, Gresbach cites *Kia P. v. McIntyre*, 235 F.3d 749, 759 (2d Cir. 2000). In that case, a private hospital held a new-born after detecting illegal drugs in her system. The Second Circuit noted its own decision in *Tenenbaum* declined to decide among three available standards for seizing a child to prevent abuse or neglect, "probable cause," "exigent circumstances," or the "less stringent" special needs-reasonableness standard.

Id. at 762. But of critical importance, the Second Circuit determined that the hospital, which already had custody of the children, was a state actor. *Id.*

Here, of course, the children were *not* in the custody of a state actor when Gresbach subjected them to the physical examinations. Instead, they were in the custody of a private actor on private property. Unlike the circumstances in *T.L.O.*, *Vernonia*, or *Earls*, then, application of the traditional Fourth Amendment analysis requiring probable cause or a warrant was in keeping with a long line of precedent on the matter.

B. Gresbach Failed to Raise this Argument Below.

Even if there were a split regarding application of a special needs-reasonableness analysis in child welfare investigations on private school premises, this is certainly not the case to mend it, much less create the new standard Gresbach urges, because she failed even to raise the argument in the district court and thus did not make a record for such a policy-sensitive determination. *See, e.g. Sosna v. Iowa*, 419 U.S. 393, 396 (1975) ("The failure of Iowa to raise the issue has . . . left us without any guidance from the parties' briefs . . . .").

Gresbach claims the district court found that "none of the exceptions to the warrant requirement, *including the special needs exception*, applied." Pet. 13 (emphasis added). That representation is factually inaccurate. Gresbach never argued or even mentioned "special needs" in her district court briefing. *See* R. 21, 54, 62. Not surprisingly, the district court decision does not mention it, either. Gresbach has therefore waived the argument, and should be precluded from asserting it here. *See Danforth v. Minnesota*, ___ U.S. ___, 128 S. Ct. 1029, 1046 (2008) (citations omitted).

Gresbach's failure to raise the special needs argument below is understandable, given the Seventh Circuit's rejection of the argument in *Doe v. Heck*. As the court stated below,

> *Heck* foreclosed the justification of the "special needs" exemption in this context, because states have "the ability to take immediate action to ensure the physical safety of a child suspected of abuse who is located on private property" through the exigent circumstances exception to the warrant requirement of the Fourth Amendment.

App. 15a n.3 (quoting *Heck*, 327 F.3d at 517 n.20).

Furthermore, having utterly failed to make a record on the issue, Gresbach relies on uncited, outlandish assertions. She claims that there were "3.6 million child abuse and neglect referrals in the year 2006," Pet. 2, that "[i]ncidents of child abuse and neglect occur every 10 seconds in America," Pet. 11, and that "[t]hese issues confront child protective services workers on a daily basis in every State in the country." Pet. 17.

This data is as unreliable as it is dangerous, as noted above. *See* Response at 1-2. Moreover, Gresbach's failure to raise the issue or create a record below deprives Respondents of the opportunity to develop a countervailing record or examine her assertions. Nevertheless, under any set of data, the special needs exception should not be extended here.

C. Applying the Special Needs-Reasonableness Analysis to *All* Child Welfare Investigations Would Swallow Both the General Warrant-Probable Cause Rule and the Consent and Exigent Circumstances Exceptions.

As explained above, this Court has already created a "special needs-reasonableness" exception for public schools in *T.L.O.* and *Vernonia*. The application of that exception to *all* child welfare investigation as Gresbach urges would swallow both the general warrant-probable cause rule and the consent and exigent circumstances exceptions with it.

Gresbach cites *Roe* in support of her position, but the two "special needs cases" analyzed by *Roe* do not support such a general application at all. *Roe* notes that in *Wyman v. James*, 400 U.S. 309 (1971), this Court upheld a New York law requiring AFDC recipients' consent to a home visit as a condition for continued benefits. The "application of the general reasonableness test was *dictum*" and did not even constitute a Fourth Amendment search. *Roe*, 299 F.3d at 405. In *Griffin*, *supra*, this Court permitted probation officers to search probationers' homes based on "reasonable grounds" because the probation system presented "special needs beyond normal law enforcement." *Roe*, 299 F.3d at 405 (citing *Griffin*, 483 U.S. at 874). Systematic supervision of convicted criminals certainly entails significant "special needs," but a probation system is not remotely comparable to merely investigating unconfirmed reports of possible maltreatment on private school premises or other private property.

Most telling, Gresbach simply ignores the result in *Roe* "that the special needs doctrine did not permit a social worker to visually search a child's body cavities as part of an abuse investigation without a warrant or exigent circumstances." *Gates v. Texas Dept. of Protective and Regulatory Services*, 537 F.3d 404, 423 (5th Cir. 2008) (explaining the holding of *Roe*, 299 F.3d at 406-07).[10]

IV. THERE IS NO SPLIT IN THE CIRCUITS CONCERNING INVESTIGATIONS ON PRIVATE PROPERTY, AND EVEN IF THERE WERE, THE LAW WAS CLEARLY SETTLED IN THE SEVENTH CIRCUIT.

Gresbach makes the remarkable argument that she is somehow not responsible for knowing clearly established law within the Seventh Circuit because the law may be unsettled somewhere else. Pet. 26-30. Again, she cites no authority for such a proposition, perhaps because there is none.

Obviously, *Doe v. Heck* was well-established law when she conducted the investigation at issue here, even involving the same Bureau under very similar circumstances. As discussed above, there was no circuit split regarding investigations on private school property. But even if there had been, a split in the circuits is relevant to the "clearly established" analysis only when

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[10] *Roe* also holds that a special needs exception is inappropriate where, as here, the inspection serves an investigative, prosecutorial function in addition to a child welfare function. *Id.*, 299 F.3d at 407. *See also Tenenbaum*, 193 F.3d at 606 (medical examination did not qualify for special needs exception where it was "undertaken at the initiative of a state official [and] serve[d] primarily an investigative function").

the case is one of first impression in the actor's *own* circuit and there are conflicting district court decisions within that circuit.

Even under those circumstances, the law may be sufficiently established in other circuits to impose liability. The Seventh Circuit has held that

> the absence of a decision by the Supreme Court or this court cannot be conclusive on the issue whether a right is clearly established in this circuit. There might be no decision in either court simply because the existence of the right was so clear, as a matter of the wording of a constitutional or statutory provision or decisions in other circuits or in the state courts, that no one thought it worth while to litigate the issue. . . . To rule that until the Supreme Court has spoken, no right of litigants in this circuit can be deemed established before we have decided the issue would discourage anyone from being the first to bring a damages suit in this court; he would be certain to be unable to obtain any damages.

Burgess v. Lowery, 201 F.3d 942, 944 -945 (7th Cir. 2000). *See also*, *Williams v. Bitner*, 455 F.3d 186, 192-93 (3d Cir. 2006) (denying qualified immunity to prison officials who required Muslim inmate to handle pork, even though neither the Supreme Court nor the Third Circuit had directly addressed the issue).

Gresbach also references this Court's order directing briefing on the analytical framework set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), in *Pearson v. Callahan*, No. 07-751 (U.S S.Ct. filed Dec. 4, 2007, *cert. granted*, March 24, 2008). Pet. 13, 27. She seems to imply that the law might not have been clearly established because the social worker

defendants in *Doe v. Heck* were granted qualified immunity and were thus unable to appeal the Seventh Circuit's threshold determination rejecting the general reasonableness standard under *Saucier*.

Gresbach's own petition in this case exposes the flaw in her argument. Even assuming the *Heck* defendants could not petition for review of an unfavorable threshold decision under *Saucier*, they suffered no prejudice because they were granted qualified immunity. Nor does Gresbach suffer prejudice under *Saucier* – obviously she has the right to petition for review of an unfavorable decision on immunity, and is in fact doing so here.[11]

Perhaps alternatives to *Saucier* can be found, but whatever they may be, *Doe v. Heck* was clearly established law in the Seventh Circuit, and Gresbach has had full opportunity to challenge its holding at every stage of this litigation – in the district court, the Seventh Circuit, and now here.

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[11] Returning to a pre-*Saucier* regime would no doubt be attractive to social workers, where constitutional violations have often continued indefinitely. Granting qualified immunity on grounds that the law was not "clearly established" precluded the opportunity to *ever* establish the law because, having dismissed the case, there was no opportunity to reach the merits. For example, in *Doe v. Louisiana*, 2 F.3d 1412 (5th Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994), two social workers manufactured evidence of sexual abuse in order to remove a child from the father's custody. The court granted immunity because the father's "family integrity" right was "nebulous," *id.* at 1417, yet refused to reach the merits of that very right. Consequently, social workers in a subsequent seizure case were again awarded qualified immunity on the very same ground – that the "family integrity" right was "nebulous." *Kiser v. Garret*, 67 F.3d 1166 (5th Cir. 1995).

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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